

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF PERMIT NO. 37-07372)	
IN THE NAME OF STATE OF IDAHO,)	
DEPARTMENT OF LANDS)	AMENDED
_____)	PRELIMINARY ORDER

This matter is before the Idaho Department of Water Resources ("Department") as a request to allow development of a well and other facilities to divert and beneficially use water in accordance with Permit No. 37-07372 ("the permit") as amended on March 29, 2000. On June 15, 2000, the Department issued a preliminary order continuing the permit. Petitions seeking reconsideration were filed by Clear Lakes Trout Company, Inc., Clear Springs Foods, Inc., the Idaho Aquaculture Association, the U.S. Fish and Wildlife Service and other water right owners in the Hagerman Valley (herein all those filing petitions for reconsideration are termed "the petitioners"). On July 11, 2000, the Department issued an order denying the petitions for reconsideration, withdrawing the preliminary order, and setting an informal meeting with the petitioners. On July 20, 2000, the Department conducted an informal meeting at Twin Falls, Idaho to review the concerns raised by the petitioners and other potentially affected water users.

The meeting was attended by approximately 30 people. Opportunity was given for those in attendance to make oral statements and for written statements and documents to be submitted after the meeting. The petitioners expressed the following concerns about the amendment of the permit and allowing its development and use:

- a. Diversion and use of water under the permit will reduce the flow of water available to holders of earlier priority date water rights from the springs in the Thousand Springs reach of the Snake River (herein all the springs in this reach are termed "the Thousand Springs").
- b. Determination of the local public interest should not be limited to the benefit provided by additional revenue to the School Endowment Fund, but should also include consideration of other factors such as the effect of the diversion and use of water under the permit on the availability of water to other water users.
- c. The published notice of the application to amend the permit and the notice to continue development under the permit did not comply with legal requirements and did not adequately advise those with a potential interest of the proposed action. Specifically, the notices of the application to amend the permit dated December 30, 1999, and January 6, 2000, did not include the "date of filing" as required by Section 42-203A(1)(b), Idaho Code, and did not provide specific notice that a new well was

proposed at a new point of diversion.

d. The application for amendment of the permit was not properly endorsed by an official representing the permit holder.

e. The condition of approval limiting the use of the permit to development of the proposed Carey Act project prevents assignment and amendment of the permit.

f. Reprocessing of permits pursuant to Sections 42-203C and 42-203D, Idaho Code, must also include a re-evaluation of the approval criteria of Section 42-203A, Idaho Code.

g. The permit should be considered to have lapsed because water was not diverted and beneficially used under the permit during the time allowed for developing the permit and submitting proof of beneficial use. Allowing the permit to be developed now so many years after its approval would injure water rights that have been developed in the intervening time period.

h. Changes to water rights appurtenant to Carey Act lands must be processed in accordance with Chapter 25, Title 42, Idaho Code.

i. The place of use listed in the permit was improperly changed prior to approval of the permit.

j. The assignment and requests to amend and continue development under the permit have been treated differently than similar requests made by the holders of other permits associated with Carey Act projects.

k. The holders of the permit should have been aware of the moratorium orders preventing development of ground water from the Eastern Snake Plain Aquifer ("ESPA") and should be subject to the moratoriums.

After review of the information in the files of the Department, consideration of the issues raised by the Petitioners, and analysis of the law pertinent to the matter, the Department makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On July 31, 1974, J. D. Baldwin and Mary A. Baldwin ("Baldwins") filed an application to appropriate 6.18 cubic feet per second ("cfs") for domestic uses, livestock watering, and irrigation of 300 acres in connection with a proposed Carey Act project. The permit issued on December 13, 1976, authorized the diversion of 6.58 cfs of ground water to be diverted from a well within the NW1/4SW1/4 Section 21, T6S, R15E, B.M. to be used for domestic purposes, livestock watering and the irrigation of 320 acres of land within parts of Sections 20 and 21, T6S, R15E, Gooding County. The file does not

include documentation clarifying why the permit was issued for more acreage and more water than included in the application.

2. The Baldwins were not able to obtain access to the land from the U.S. Bureau of Land Management to develop the Carey Act project. However, the Department records indicate that the Baldwins diligently continued efforts to obtain the necessary approvals to allow the development to occur. The Baldwins received an extension of the proof of beneficial use deadline on the permit and filed an application for a second extension which has not been processed.

3. The conditions of approval of the permit include the following provision:

Approval of this permit is for the specific benefit of the Carey Act Project known and designated as J. D. and Mary A. Baldwin (37-CA-03). In the event that the request to the U.S. Bureau of Land Management for segregation of lands for such project is denied or if, for any reason, the applicant does not proceed with the project under provisions of the Carey Act, this approval shall be null and void.

4. The Department has not taken action to lapse or void the permit and it remains current in the records of the Department. However, certain changes to the statutes and rules and certain orders issued by the Department, after issuance of the permit, affect the development and use of the permit:

a. In 1985, Section 42-203D, Idaho Code, was enacted requiring reprocessing in accordance with Section 42-203C, Idaho Code, all undeveloped permits seeking use of water held in trust by the state under the Swan Falls Agreement. The proposed point of diversion for the permit as issued and as amended is within the area within which ground water is designated as trust water.

b. The Department adopted Water Appropriation Rules in 1986 (IDAPA 37.03.08) which include a procedure for the reprocessing of undeveloped permits proposing to use trust water.

c. An order was issued in 1992 placing a moratorium on the issuance of permits for diversion and consumptive use of ground water from the ESPA. Any well constructed at the proposed point of diversion for the permit as originally issued and as subsequently amended would divert water from the ESPA.

d. In 1994, the Department issued an "Order for Temporary Stay of Development and Notice of Formal Proceedings" in connection with outstanding permits from the ESPA. The order required permit holders to stop additional development under permits and to either file proof of beneficial use of water, to show that a "substantial investment" had been made in developing a permit or

request an indefinite stay in the development period. Because the Baldwins were not served with a copy of the order as required by Rule 55 of the Water Appropriation Rule (IDAPA 37.03.08), whether or not they became aware of the order through indirect means, they were not required to respond to the requirements of the order.

e. In 1994, the Department adopted rules for conjunctive management of ground and surface water (IDAPA 37.03.11). These rules provide a procedure for filing a plan to mitigate injury to the holders of water rights with earlier priority dates.

5. On May 26, 1999, the Department received an assignment of the permit from the Baldwins to Faulkner Land and Livestock Company ("Faulkner"). On the same day, the Department receipted the filing fee for an application filed by Faulkner to amend the permit by changing the point of diversion and place of use. The Department advised Faulkner that the application for amendment would not be processed and approved because of the condition of approval on the permit limiting use of the permit to development of the Baldwin Carey Act Project. After discussions and correspondence with Faulkner, the Idaho Department of Lands ("IDL"), and the Idaho Land Board, the Department agreed to process the application for amendment if the permit were assigned to and held by IDL. Faulkner, Baldwin and IDL entered an agreement dated November 4, 1999, voiding the assignment of the permit from Baldwin to Faulkner, assigning the permit to IDL, and agreeing to the processing of an amendment allowing use of the permit on lands owned by the State of Idaho. On November 3, 1999, the Baldwins signed an assignment of the permit to IDL. The argument assignment provide a basis for processing the application for amendment in the name of IDL.

6. On March 29, 2000, after notice and opportunity for protest, the Department issued a preliminary order approving an application for amendment that conditionally changed the point of diversion to Lot 3, Section 5, T7S, R15E and the place of use of the permit to 320 acres of land owned by the State of Idaho within parts of Section 5, T7S, R15E, B.M. The notice, published on December 30, 1999, and January 6, 2000, in the Gooding County Leader, listed the location of the permitted place of use, the proposed new point of diversion, and the proposed new place of use. The amendment was processed in accordance with Section 42-211, Idaho Code, which provides for the director to give notice to other affected water users "as he deems appropriate." The list of items required to be published in the legal notice of an application for permit under Section 42-203A, Idaho Code, is not applicable to an application for amendment filed under Section 42-211, Idaho Code. Protests were not received concerning the amendment.

7. On May 4, and May 11, 2000, the Department published notice that the permit was being reprocessed in compliance with Section 42-203D, Idaho Code. The form and substance of the published notice followed the pattern used to give similar notice of numerous permits reprocessed during 1987 to 1992. No protests were filed opposing continuance of the permit.

8. The Department has determined that diversion and use of water as proposed in the permit will not significantly reduce the amount of trust water available to the holder of the water right used for power production as provided in Section 42-203C, Idaho Code (Reference Memorandum Decision and Order – Permit No. 35-07488 issued February 5, 1990).

9. Information available to the Department indicates that the diversion, and subsequent use, of ground water from the ESPA at the location proposed under the amended permit will affect the amount of water discharging from the aquifer through springs, including the Thousand Springs. The amount, location and timing of reduction in spring flow and the consequent potential for injury to other water rights is dependent upon various factors. (Reference “Upper Snake River Basin Study,” Idaho Department of Water Resources January 1997, pages 72 and 73).

10. A provision allowing development of water, if mitigation is provided to prevent injury to other rights, is included in both the “Amended Moratorium Order” dated April 30, 1993, prohibiting issuance of new permits for consumptive use of water from the ESPA and the “Order for Temporary Stay of Development and Notice of Formal Proceedings” dated November 9, 1994 stopping development under existing permits from the ESPA. Paragraph 5b of the latter order provides for the Director of the Department to approve diversion and use from the aquifer on a case-by-case basis if:

The Director determines that continued development and use of water will have no effect on prior water rights because of its location, insignificant consumption of water or mitigation provided by the permit holder to offset injury to other rights.

11. Water rights with priority dates junior to the permit have been issued and developed which may be affected by diversion and use of water at the amended point of diversion and place of use of the permit. Legal injury to the holders of these water rights can be avoided by advancing the priority date of the permit.

12. The permit has not been developed or licensed and is not appurtenant to the land listed in the Baldwin’s Carey Act project.

13. The holders of the permit have not and should not be treated differently than holders of other water right permits for undeveloped Carey Act projects. The holders of the permit have taken actions to address the Department’s concerns regarding speculation and the public interest. Because the holders of other water right permits for undeveloped Carey Act projects have not filed assignments or applications to amend or continue development of their water right permits, the Department has not issued formal rulings affecting these other permits.

CONCLUSIONS OF LAW

1. Section 42-204(1), Idaho Code, provides that in cases where the applicant is prevented from proceeding because the applicant has not obtained necessary consent or final approval or rejection from the federal government of an application for right of way or other matter within the jurisdiction of the United States, the Department shall extend the time given in the original permit. The Baldwins, prevented from developing the permit because of inability to obtain necessary consent from the U.S. Bureau of Land Management to enter the Carey Act project lands, applied for and were entitled to an extension of time. The permit remains current in the records of the Department.

2. The signed, written agreement between Faulkner, Baldwins and IDL, as well as the subsequent assignment, places ownership of the permit in the name of IDL and authorizes processing of the application to amend the permit filed by Faulkner in the name of IDL.

3. The notices published by the Department concerning amendment and continuation of the permit, while succinct, provided notice of the proposed actions as required by applicable law.

4. Section 42-203D, Idaho Code, provides for issuance of an order allowing continued development of a permit for water held in trust by the State of Idaho if the criteria listed in Section 42-203C, Idaho Code are satisfied. Section 42-203C(1), Idaho Code, provides in pertinent part:

...the director shall consider, prior to approving the application, the criteria of Section 42-203A, Idaho Code, and whether the proposed use, individually or cumulatively with other existing uses, or uses reasonably likely to exist within twelve (12) months of the proposed use, would significantly reduce the amount of trust water available to the holder of the water used for power production that is defined by agreement pursuant to subsection (5) of section 42-203B, Idaho Code....(emphasis added).

Because the criteria listed in Section 42-203A, Idaho Code, were considered prior to issuance of the permit, Section 42-203C, Idaho Code, does not require reconsideration of these criteria at the time a permit (as contrasted with an unapproved application to appropriate trust water) is reprocessed.

5. Diversion and use of water under the permit will not individually, or cumulatively with other uses, significantly reduce the amount of trust water available to the holder of the water used for power production. Accordingly, Section 42-203C, Idaho Code, does not require consideration of the public interest criteria listed therein.

6. Diversion and use of water under the permit will affect the flow of springs discharging from the ESPA, including the Thousand Springs, and could reduce the

quantity of water available to other right holders if the effect is not mitigated by IDL.

7. Section 42-211, Idaho Code, provides in pertinent part as follows:

Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment...(emphasis added).

The authority to make “other substantial changes” allows conditions placed upon a permit at the time of approval to be changed or deleted, or for other conditions to be added. The condition on the permit restricting it to development of the Baldwin Carey Act Project can be deleted or revised if the Director determines that amending the permit complies with the criteria of Section 42-211, Idaho Code.

8. Section 42-211, Idaho Code, is applicable to applications to change the point of diversion and place of use for any water right in the permit stage. Chapter 25, Title 42, Idaho Code, is applicable to such changes only after the water right has become appurtenant (licensed as provided in Section 42-220, Idaho Code) to Carey Act project land.

9. Section 42-211, Idaho Code, provides that the priority date of a permit dates from the date of filing the application for permit unless an amendment results in the use of more water. If a filing is amended to use more water, the priority date is advanced to the date of filing the amendment. Because the permit was issued for more acres and more water than originally applied for, the priority date should be advanced.

10. The Department should issue an order continuing the permit and should extend the proof due date because of delays over which the permit holder and its predecessors had no control. Diversion and use of water under the permit should be conditioned to prevent injury to other water rights existing in the area.

11. Diversion and use of water under the permit should only be authorized upon approval of a plan to mitigate injury to the holders of other water rights from ground water and surface water sources in the area. In accordance with the provisions of the “Order for Temporary Stay of Development and Notice of Formal Proceedings” issued by the Department on November 9, 1994, construction of a well and diversion and use of water under the permit shall not commence or continue until a plan to mitigate injury to prior rights is submitted to and approved by the Department in accordance with Rule 43 of the “Rules for Conjunctive Management of Surface and Ground Water Resources” (IDAPA 37.03.11).

ORDER

IT IS, THEREFORE, HEREBY ORDERED that Permit No. 37-07372 is **CONTINUED** as provided in Section 42-203D, Idaho Code, subject to the following conditions:

1. The time within which to submit proof of beneficial use of water for the above captioned permit is extended to **November 1, 2004**.
2. The permit holder shall comply with the conditions of approval shown on the amendment of permit document.
3. The priority date of Permit No. 37-07372 is advanced to the date the application for amendment was receipted (May 26, 1999).
4. Construction of a well and diversion and use of water under Permit No. 37-07372 shall not commence or continue until a plan to mitigate injury to prior rights from the Thousand Springs is submitted to and approved by the Department in accordance with Rule 43 of the "Rules for Conjunctive Management of Surface and Ground Water Resources" (IDAPA 37.03.11).
The permit holder shall provide a copy of the proposed mitigation plan to each of the petitioners. The Department will accept and consider comments from the petitioners and others interested in the matter prior to taking action to approve or deny the mitigation plan.

Dated this 13th day of October, 2000.

_____-signed-_____
NORMAN C. YOUNG
Administrator
Water Management Division